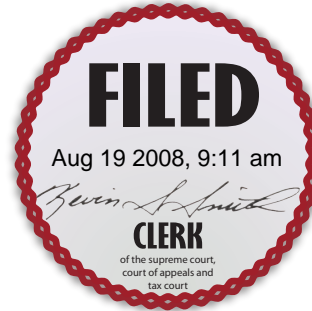


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ERSKIN JENKINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A03-0802-CR-57

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0606-MR-9

August 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Erskin Jenkins (“Jenkins”) was convicted in St. Joseph Superior Court of murder. Jenkins was sentenced to fifty-five years, with ten years suspended to probation. Jenkins appeals the following issues: whether the trial court erred in refusing to instruct the jury about voluntary manslaughter and whether Jenkins was denied effective assistance of counsel.

We affirm.

Facts and Procedural History

In the early morning on June 18, 2006, a large number of people gathered outside of a gas station and convenience store in South Bend, Indiana. Among the crowd was Jenkins as well as Anwon Davis (“Davis”). At some point, Jenkins fired shots into the air. An altercation then occurred between Davis and Michael Anderson (“Anderson”), a relative of Jenkins. During the fight, Davis was lifted off the ground by Anderson. Jenkins approached the pair, fired a shot into the air, pointed the gun at Davis’s head and fired.

Jenkins claimed that he and Davis had struggled over the gun during the altercation involving Anderson and that the gun accidentally discharged, killing Davis. Jenkins then remained on the run from police for six months. During that time he threw the gun in the river. Jenkins eventually turned himself into the police.

The State charged Jenkins with murder on June 23, 2006. The jury trial took place on November 26, 2007. During the trial testimony of Anderson, Anderson exclaimed, “I’m going to the penitentiary?” Anderson stated that Sergeant David Wells (“Sergeant Wells”), a State’s witness, mouthed those words to him. After the trial court settled

Anderson down, questioning continued with no request for admonition or mistrial. The next day, several jurors told the bailiff that they had apparently seen Sergeant Wells communicate with Anderson. Jenkins's counsel asked to cross-examine Sergeant Wells on this but chose not to after a recorded conference with the trial judge and the State. The trial court admonished the jury regarding the statements and determined that none were prejudiced by the outburst. Jenkins was convicted of murder and sentenced on January 4, 2008 to fifty-five years with 10 years suspended to probation.

Jenkins appeals.

I. Voluntary Manslaughter Instruction

Jenkins first argues that trial court abused its discretion when it refused his tendered final instructions on the lesser-included offense of voluntary manslaughter. We use a three-step analysis to determine whether instructions on lesser-included offenses should be given. Wright v. State 658 N.E.2d 563, 566 (Ind. 1995). We must determine: (1) whether the lesser-included offense is inherently included in the crime charged; if not, (2) whether the lesser-included offense is factually included in the crime charged; and if either, (3) whether there is a serious evidentiary dispute where the jury could determine that the defendant committed the lesser offense but not the greater. Id. at 566-67. Reversible error occurs when the trial court did not give a requested instruction on the inherently or factually included lesser offense, if the jury could conclude that the lesser offense was committed and not the greater. Id. at 567.

The standard of review for this type of case is as follows:

For convenience we will term a finding as to the existence or absence of a substantial evidentiary dispute, a Wright finding. Where such a finding is

made we review the trial court's rejection of a tendered instruction for an abuse of discretion. This finding need be no more than a statement on the record that reflects that the trial court has considered the evidence and determined that no serious evidentiary dispute exists. Its purpose is to establish that the lack of a serious evidentiary dispute and not some other reason is the basis of the trial court's rejection of the tendered instruction. However, if the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo.

Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998) (citations omitted).

Voluntary manslaughter is inherently included in murder. O'Connor v. State, 399 N.E.2d 364, 368 (Ind. 1980). In this case, the trial court determined that the facts did not support a serious evidentiary dispute regarding sudden heat, and we will review for an abuse of discretion. Brown v. State, 703 N.E. at 1019.

Jenkins argues that a serious evidentiary dispute exists regarding sudden heat. Sudden heat is "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection." McBroom v. State, 530 N.E.2d 725, 728 (Ind. 1988). To establish sudden heat, Jenkins must show "sufficient provocation to engender . . . passion." Clark v. State, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005) (quoting Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988)). "Any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." Id.

Jenkins argues that a serious evidentiary dispute exists because the fight between Anderson and Davis and his own struggle with Davis for possession of the gun obscured Jenkins's reason such that he was incapable of cool reflection. Additionally, he argues that a previous altercation with Davis added to the situation. However, Jenkins never

argued at trial that he acted with sudden heat. By his testimony, the shooting was accidental. According to Jenkins, during a struggle over the gun, someone pulled the trigger. Tr. p. 653. Jenkins testified that if he pulled the trigger, the act was not intentional. Id. For all of these reasons, Jenkins has failed to show an appreciable evidence of sudden heat.

The trial court properly determined that there was no evidentiary dispute regarding whether Jenkins acted in sudden heat. Therefore, we conclude that the trial court did not abuse its discretion by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

II. Ineffective Assistance of Counsel

Jenkins argues that he received ineffective assistance of counsel.¹ In a review of ineffective assistance of counsel claim, we utilize the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that errors committed by counsel were so serious that the defendant was effectively denied the right to counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. at 152. "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Second, the defendant must show that the deficient performance

¹A post-conviction hearing is generally the preferred forum to adjudicate a claim of ineffective assistance of counsel. McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). Presenting such a claim often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. While a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220.

prejudiced his defense. Overstreet, 877 N.E.2d at 152. The defendant must show that the errors were so serious that the defendant was deprived of a fair trial. Id. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Id.

Specifically, Jenkins believes that his trial attorney should have examined Anderson on any potential influence that Sergeant Wells had on Anderson’s testimony and his attorney should have examined Sergeant Wells on what he had allegedly communicated to Anderson. Additionally, Jenkins believes that his counsel should have objected to the admonishment of the jury regarding Anderson’s outburst because it insinuated that the outburst and the circumstances surrounding it were unimportant.

During the testimony of Anderson, Anderson exclaimed, “I’m going to the penitentiary?” Tr. p. 528. This occurred in apparent response to a statement mouthed by Sergeant Wells. During the trial, counsel did not object at the time of the outburst, however after the trial court brought the comments of a few jurors to his attention, the trial counsel then asked the trial court to cross-examine Sergeant Wells about the outburst. Tr. p. 580. The trial court suggested that doing that would not be advisable since the statement reflected poorly on Sergeant Wells, a State’s witness, not on Jenkins. Id.

The trial court admonished the jury and told them that if an exchange between Anderson and Sergeant Wells did occur, it had nothing to do with the evidence presented

in the case at hand and should not be considered. Id. The trial court then asked the jury if the outburst by Anderson would prejudice their decision. Tr. p. 585. The jury answered that it would not prejudice them. Id.

Ultimately, Jenkins must show that he was in fact prejudiced by the conduct of his trial counsel. As noted by the trial court, the exchange occurred between State's witnesses and did not involve Jenkins. After discussion with the trial court, trial counsel evidently determined that drawing further attention to the exchange would not be beneficial to Jenkins. In addition, the trial court admonished the jury and "[r]eversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003) trans. denied. The trial court's admonishment was sufficient to protect Jenkins's rights. Trial counsel did not provide ineffective assistance.

Conclusion

The trial court did not abuse its discretion when it refused Jenkins's instruction on voluntary manslaughter. Jenkins failed to establish ineffective assistance of counsel.

Affirmed.

BAKER, C.J., and BROWN, J., concur.